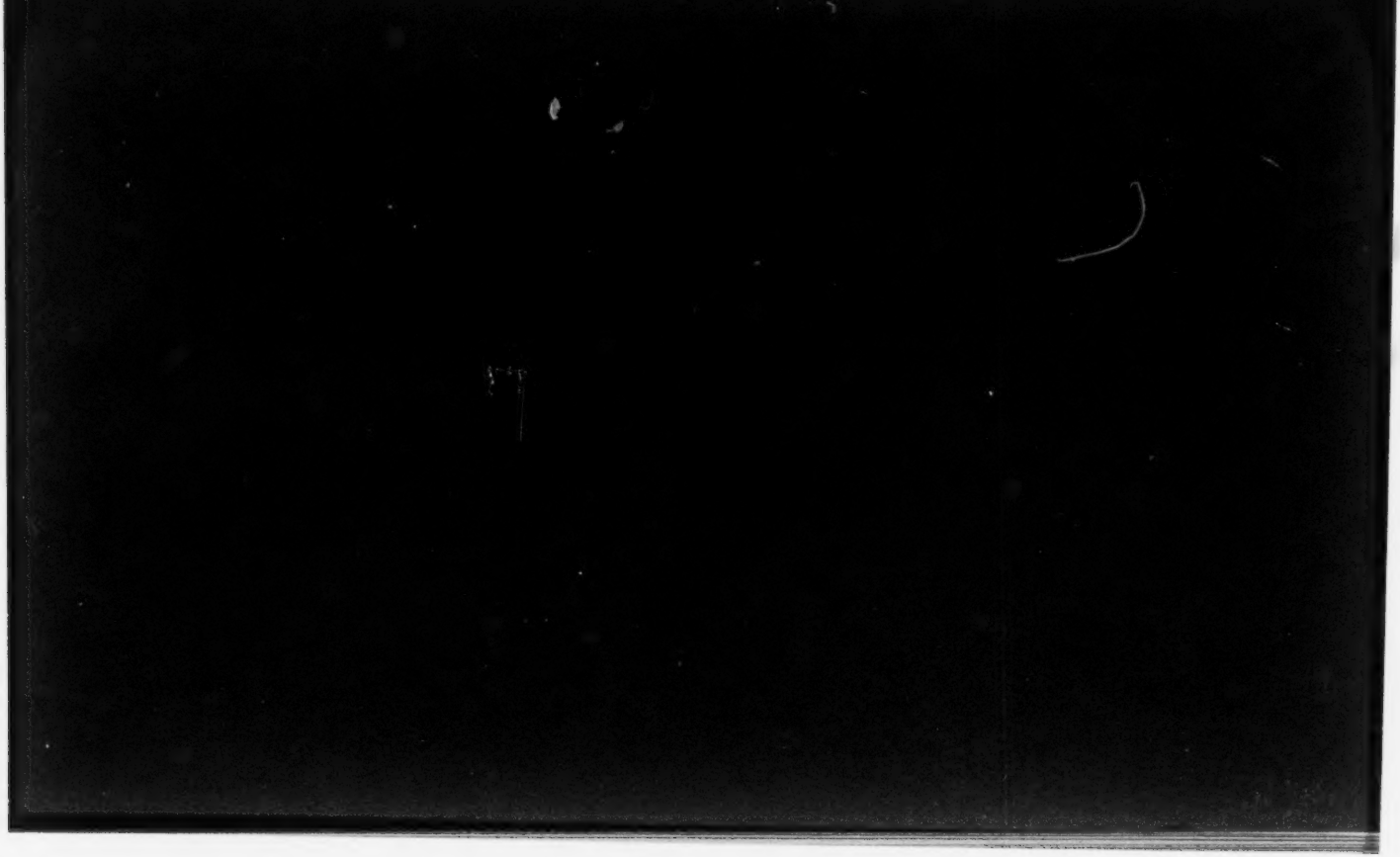

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1943

No.

JAMES W. BUTLER, MARY L. BUTLER, MARY SEQUIN, CLARA VERSCHOOR, LILLIAN FITZGERALD, DAVID J. LEWIS, ELIZABETH A. LEWIS, JOHN LINGIE SMITH, ELLA RUTH SMITH, PATRICK J. LEONARD, ANNIE LEONARD, STEPHEN C. PERRY, CARLE HILLEBRAND, MRS. C. C. E. HILLEBRAND, FRED HUSSEY, MRS. H. L. GOOCH, OSCAR SWANSON, MARVIN WALTER WAFER, GEORGE W. IRVINE, BETTY DU BOIS, MRS. I. B. BRAWLEY, MARGARET JOHNSTONE, JAMES J. PHELAN, J. H. PEGRAM, MRS. J. H. PEGRAM, MARIE C. KNIEF, AMOS WASHINGTON, DOROTHY LEWITZ, MARIE C. CROSS, VIOLETTE M. CROSS, CHARLES L. FORSEBERG, and MAIDGE MCNAUL,

Respondents,

vs.

GRACE APPLETON MCKEY,

Petitioner.

BRIEF IN SUPPORT OF PETITION.

THE FACTS.

The default judgment in this case was predicated upon a service by publication, in the manner provided for in Section 412 of the California Code of Civil Procedure.

The question before the District Court and before the Circuit Court of Appeals, was whether the affidavit of one Fred S. Herrington, was a sufficient base for the order for publication, so that by publication jurisdiction was obtained against petitioner herein.

As we have shown in the petition (p. 2), Rule 4 (d) of "Federal Rules of Civil Procedure" provides that service by publication shall be made "in the manner prescribed by any statute of the United States or in the manner prescribed by the laws *of the state in which service is made.*" 20 U. S. C. A. 383.

Since there is no federal statute for service by publication, on one who cannot be found within the state, California law applies in the present instance, as the Court of Appeals concedes in its opinion.

Section 412 of the *Code of Civil Procedure* requires that before an order for publication can be lawfully made, the fact that the defendant cannot be found within the state or is secreting him or herself, must appear by "affidavit", and it *must* also appear by *affidavit* that

> "there has not been filed, on behalf of such person (the defendant) * * * either in the County in which such action was brought, or in the County in which such action is pending, the cer-

> tificate of residence provided for by Section 1163 of the Civil Code * * *."

Herrington's affidavit (the only affidavit filed) upon which the order for publication was based, recites that he had sent the summons to the U. S. Marshal and relates what the Marshal reported back, and that he had sent an alias summons to a process server in Los Angeles, California, and what the process server wrote to affiant with reference to his purported attempts to serve defendant—and winds up with the conclusion that the defendant (petitioner herein) was avoiding service and could not be found in California. (R. 46.)

The *affidavit,* in a futile effort to comply with the last above quoted provision of Section 412, states:

> "that affiant is *informed and believes* and therefore alleges the fact to be that there has not been filed by said defendant, or on her behalf, in the City and County of San Francisco, State of California, where said action was brought and is pending, a certificate of residence as provided for in Section 1163 of the Civil Code of California." (R. 57.)

It will thus be seen that whether the trial Court acquired jurisdiction over petitioner herein depends upon whether under California law jurisdiction is obtained of the person of the defendant where the affidavit upon which the order for publication of summons is based, is one of hearsay.

COURT OF APPEALS' DECISION.

The Circuit Court of Appeals' opinion says that under California law an order for publication of summons, based upon hearsay, is bad against a direct attack, but invulnerable to a collateral attack (R. 112), and that while petitioner's attack on the judgment "is a direct attack" it was made after the time for appeal had expired (because perchance petitioner did not know of the existence of the judgment until after the appeal period had long expired), and therefore "must be considered under the principles applicable to a collateral attack". (R. 112.)

CALIFORNIA DECISIONS CONTRARY TO COURT OF APPEALS' DECISION.

The Supreme Court of California in *Kahn v. Matthai,* 115 Cal. 689, at 693, held that an affidavit which recited efforts of 5 different persons (other than affiant) to locate and serve defendants, was not an "affidavit", as meant in Section 412 of the Code of Civil Procedure, and

> "hence that the Court below failed to obtain jurisdiction of the person of the defendant."

In the case of *In re Behymer,* 130 Cal. App. 200 (1933), one of California's District Courts of Appeal held that an affidavit reciting the efforts of someone else to locate and serve a defendant was insufficient upon which to base a substituted or published service, and that the judgment based upon such a service was *"void"* and that the Court could "at any time properly set it aside", saying:

> "a judgment or order void on its face may be vacated on motion at any time, or the Court may on its own motion, set it aside or disregard it, regardless of how the invalidity is brought to its attention; a judgment or order is said to be void on its face, when the invalidity is apparent upon an inspection of the judgment roll."

In *Columbia Screw v. Warren Lock Co.*, 138 Cal. 445 (cited by us in the petition), the Supreme Court, after commenting that when the statute uses the word "affidavit", in Section 412, "it means more than an affidavit as to what some one told the party making the affidavit", held that an order based upon such an affidavit is void, and that therefore jurisdiction was never obtained over the defendant and the judgment "should not be enforced in any manner". (449)

CASES RELIED UPON IN OPINION DO NOT SUPPORT COURT OF APPEALS' OPINION THAT THE AFFIDAVIT IS SUFFICIENT.

In *Rue v. Quinn*, 137 Cal. 651 (1902) (cited in Court of Appeals' opinion, R. 112), the affidavit was only partly hearsay—the remainder of the judgment showed a personal search by the affiant. In that case the Court held that,

> "A motion to set aside a judgment upon the ground that it appears upon the face of the judgment record that the Court had no jurisdiction of the person of the defendant is a direct attack upon the judgment and is not barred by mere lapse of time." (p. 654.)

Furthermore, that Court held that if the defect appeared on the face of the judgment roll, it did not make any difference whether the attack was direct or collateral. (654) In the case at bar, since Section 412 of the California Code of Civil Procedure makes the proof by affidavit essential, and since Section 670 of the same code requires the affidavit to be a part of the judgment roll, the attack, even if collateral, stands on an even footing with a direct attack.

In *Ligare v. California R. R. Co.,* 76 Cal. 610 (1888) (see Court of Appeals' decision, R. 112), the affidavit was not attacked on the ground of hearsay, but the Court passed on the question whether the degree of diligence shown was sufficient. The Court held that the affidavit was probably insufficient on appeal, but was good on collateral attack. The attack in that case was a true collateral attack upon a judgment, when its use was sought in another case.

THE COURT OF APPEALS MISINTERPRETS CALIFORNIA LAW IN DECLARING THAT AN ORDER BASED UPON A HEARSAY AFFIDAVIT IS VOID UNDER DIRECT ATTACK AND VALID UNDER COLLATERAL ATTACK.

The reasoning of the Court below is incomprehensible to us. We respectfully believe that it was misled into error by selecting sentences from several decisions and lifting them out of their text and applying them in a sense not contemplated by the authors of the opinions.

Before petitioner petitioned the Court of Appeals for a rehearing, that Court's finding on the question involved read as follows:

> "It seems evident that in California an affidavit based on information and belief would support an order for publication of summons. Two California Supreme Court decisions very definitely hold that the hearsay nature of facts stated in an affidavit may be considered by the judge in drawing his conclusion as to due diligence, but that such a hearsay affidavit does not automatically render the judgment void. Rue v. Quinn, 137 Cal. 651; Ligare v. California Southern Rr. Co., 76 Cal. 610. Directly contra to this principle is Kahn v. Matthai, 115 Cal. 689, and perhaps Columbia Screw Co. v. Warner Lock Co., 138 Cal. 445."

On the petition for rehearing we called to the Court's attention the fact that *Columbia Screw Co. v. Warner Lock Co.*, 138 Cal. 445, which the Court said was "perhaps" directly contrary to the "principle" it was adopting, was rendered later in point of time than the latest case the Court was relying on, namely *Rue v. Quinn*, 137 Cal. 651, and therefore was the law of California on the point.

The Court denied a rehearing but modified the judgment by striking out the words "and perhaps, Columbia Screw Co. v. Warner Lock Co.", and substituting the following:

> "* * * Columbia Screw Co. v. Warner Lock Co., 138 Cal. 445, held on direct appeal that a judgment based upon hearsay statements in the affidavit for the publication of summons could

> be set aside. It does not overrule Rue v. Quinn, supra, holding that on similar facts such a judgment could not be set aside on collateral attack. * * *" (R. 113.)

(N. B. We cannot give Record references to the above quoted portion of the opinion as it read before its amendment by the Court, for the reason that we have been advised that the record must contain only the decision as modified, after hearing of petition on rehearing.)

It will be observed that in the forepart of the quoted language, the Court limited its holding to cases in which the attack on the judgment is *"collateral"*.

Later in the opinion, the Court of Appeals says:

> "The California cases support the conclusion that on a direct appeal from a judgment an affidavit based upon hearsay *will be found fatally defective* and the judgment will be ordered reversed." (Emphasis ours.)

We believe we can demonstrate that the California Courts make no such distinction, where the fact to be established by the affidavit is shown *by hearsay only*. But before going to the cases, we feel impelled to attack such a statement as being entirely beyond the realm of reasonable justice.

Necessarily the only cases in which an affidavit for publication of summons are ever considered is where the publication is followed by a default judgment. Whether the defendant can appeal from the default judgment depends on whether he discovers the fact

that the judgment has been taken against him or her in time to take an appeal. If he discovers on time and appeals, under the rule of the Court of Appeals (and under the law of California), on such appeal the judgment will be held void. But if (according to the Court of Appeals and not according to California law) the defendant doesn't discover that judgment has been rendered against him until after the appeal period has past, and by necessity attacks the judgment in the manner followed in the case (which is in fact a *direct attack* as the Court concedes (R. 112)) the judgment will be valid.

The Court of Appeals cites *Forbes v. Hyde,* 31 Cal. 342, 348, as California authority for the distinction, but the California Supreme Court drew no such distinction in that case. In that case there was involved a true collateral attack upon a default judgment, for it was made by a stranger to the judgment and in another action. Section 412 of the California Code of Civil Procedure requires of an affidavit for publication of summons that it show that "a cause of action exists against a defendant". The affidavit of the plaintiff in the *Forbes* case recited on the point, that

> "he has a good cause of action, and that he is a necessary and proper party defendant thereto, as he verily believes." (353)

The Supreme Court of California held in that case that this was not a statement of fact, not "legal" evidence, and that the default judgment entered in the case was *absolutely void.* (353, 355.)

If one reads the Court of Appeals' quotation from the decision in the *Forbes* case (supra) (see opinion, R. 113, 114), in the light of the foregoing, he will discover that when the Court in that case used the words "legal evidence", it meant something other than hearsay.

And in that case the Court said the following with reference to the right of appeal, which the Court of Appeals says must be exercised to avoid a default judgment, where the affidavit for publication is hearsay:

> "An appeal is no adequate remedy where a party has no notice, for the time to appeal is very brief and may expire before actual notice is obtained. In the language of the Court in Smith v. Rice, 11 Mass. 512, 'the very grievance complained of is that the party had no notice of the pending of the cause, and of course no opportunity to appeal.' (See, also, Bloom v. Burdick, 1 Hill. 142.)"

And what is more significant is that the Court in *Forbes v. Hyde* very clearly showed that when speaking of collateral attack, it was not referring to motions such as this, because it said at one point in its opinion:

> "But as there was jurisdiction to act until reversed, or attacked by *some direct proceeding to annul it,* the order and judgment based upon it would be valid." (31 Cal. 348.) (Emphasis ours.)

Incidentally this short sentence was supplanted by three asterisks in the long quotation from that deci-

sion, in the Court of Appeals' decision in the present case. *Ligare v. California R. R. Co.,* 76 Cal. 710, was likewise cited in the Court of Appeals' decision (R. 114) on this point. It was a true collateral attack, being made by one not a party to the judgment and in another action. It adopts the language just above quoted from the *Forbes v. Hyde* opinion.

So no case cited in the Court of Appeals' opinion supports its contention that there is any difference under California law between attacking a default judgment on appeal and on motion to set it aside, where the defect is apparent from an examination of the judgment roll.

It is true that in *City of Salinas v. Lee,* 217 Cal. 252, the California Supreme Court held that where a motion to set aside a default judgment is made after the time for appealing has expired, it is the equivalent of a collateral attack, and to invalidate a judgment at that late date one must be able to direct attention to a defect appearing on the face of the judgment roll. Here the fact that the affidavit is required by the California Code section, and is made a part of the judgment roll, makes that distinction immaterial.

CONCLUSION.

We respectfully submit that the Circuit Court of Appeals in its decision, ignored the plain import of the pertinent California statute, and has misinterpreted the effect of the decisions of the California

Courts, in a matter of very considerable importance to the residents of California.

Dated, San Francisco, California,
January 24, 1944.

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